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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|---|-------------|----------------------|---------------------|------------------|
| 10/502,082 | 07/22/2004 | Nils Cornelis Sips | 7393/8-4061 | 8981 |
| 42798 7590 01/08/2009 FITCH, EVEN, TABIN & FLANNERY P. O. BOX 18415 WASHINGTON, DC 20036 | | | | |
| EXAMINER STULIL, VERA | | | | |
| ART UNIT | | PAPER NUMBER | | |
| 1794 | | | | |
| MAIL DATE | | DELIVERY MODE | | |
| 01/08/2009 | | PAPER | | |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/502,082

Applicant(s)

SIPS ET AL.

Examiner

VERA STULII

Art Unit

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 September 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 16-18,21-23 is/are pending in the application.
- 4a) Of the above claim(s) 8-11,14,15 and 20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-7 and 16-18,21-23 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claim Objections

Claim 22 is objected to because of the following informalities: newly added claim 22 depends from claim 8 which has been withdrawn. Appropriate correction is required.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1-7, 16-18 and 21-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kettlitz (US 6,235,894) et al in view of Daenzer-Alloncle et al (6,139, 896).

The claims are rejected for the same reasons as stated in the Office action mailed July 11, 2008.

Response to Arguments

Applicant's arguments, see page of the Reply to the Office action mailed July 11, 2008, filed September 26, 2009, with respect to the rejection under 35 U.S.C. 112, second paragraph, have been fully considered and are persuasive. The rejection under 35 U.S.C. 112, second paragraph has been withdrawn.

Applicant's arguments filed September 26, 2009 regarding the rejection under 35 U.S.C. 103(a) have been fully considered but they are not persuasive.

On page 9 of the Reply Applicants state that:

Applicants courteously submit the references do not teach the present inventions, would not have been combined, and furthermore even if, *arguendo*, they were combined the elected claimed inventions would have been unobvious to a person of ordinary skill in the art.

The elected claims pertain to a UHT-treated, product that has a relatively low viscosity after heat treatment (UHT). It can be sterilized. The UHT-treated product is reheatable and when reheated exhibits a viscosity increase as recited in claim 1 as an example.

In contrast, the primary reference, Kettlitz '894, is wide of the mark as it discloses stabilized starches that only maintain/retain their pre-existing viscosity even after reheating. In other words, Kettlitz '894 teaches away from the presently claimed invention.

Examiner respectfully disagrees. As stated by Applicants in the specification "[for] obtaining the stabilized starch n-alkenyl succinate, the starch n-alkenyl succinate can be treated with active chlorine and can be prepared according to the process described in EP 0811633". Thus Applicants admit that the starches used in the present inventions can be prepared according to the process described in EP 0811633. It is further noted that EP 0811633 was also published as US 6,235,894, which is used as a main reference in the instant rejection. Therefore, it is not seen how Kettlitz '894 teaches away from the presently claimed invention, when in fact, Kettlitz '894 disclose the same starches as claimed by Applicants.

On page 10 of the Reply, Applicants state that:

- Kettlitz '894 does not disclose UHT-treated food products. Kettlitz '894 does not specifically disclose UHT treatment of a food product. This stands acknowledged in the Office Action at page 5, penultimate paragraph, with which Applicants concur.
- Kettlitz '894 does not additionally disclose reheating a UHT-treated food product.

- Kettlitz '894 does not disclose, describe, or suggest that a reheated UHT-treated food product would demonstrate an increase in viscosity in accordance with Applicants' elected claims.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). As stated in the Office action mailed July 11, 2008 and above, Kettlitz '894 disclose the same starches as claimed by Applicants. Kettlitz et al disclose that highly swollen (viscous) cooking stable starches are used in many different applications, for example in the preparation of soups, sauces, meat products, dressings, micro-wavable food and in the preparation of bakery creams and fillings, in convenience foods that need to have a high viscosity and smooth texture after heating (to 80-100°C) (Col. 1 lines 46-50). Kettlitz et al disclose that stabilized high viscosity starches are particularly suitable for the mentioned applications (Col. 1 lines 51-53). Kettlitz et al disclose stabilized starch n-alkenyl succinate (Col. 2 lines 55-56) and stabilized starch n-octenyl succinate (Col. 2 lines 56-57). Kettlitz et al disclose soups, sauces, meat products, dressings, micro-wavable food, bakery creams and fillings (Col. 1 lines 46-50). Kettlitz et al do not specifically disclose UHT treatment of the food products. However, Kettlitz et al disclose use of stabilized starch n-alkenyl succinate in the food products that normally undergo UHT/high-temperature/sterilization/ pasteurization treatment. Daenzer-Allondle et al disclose a lactic cream which has been treated by an ultra-high temperature ("UHT") treatment or other sterilization procedure or by pasteurization to

provide a cream product for unrefrigerated storage and which contains between 1.5 and 4% by weight of modified starch for controlling viscosity, so that the composition has a viscosity between 250 and 1600 mPas (Abstract). Since Daenzer-Alloncle et al disclose use of modified starch as a viscosity component in a cream product that undergoes heat treatment, and Kettlitz et al disclose use of heat stable high viscosity starches in preparation of cream products, one of ordinary skill in the art would have been motivated to employ heat stable high viscosity starches in preparation of cream products as taught by Daenzer-Alloncle et al. One of ordinary skill in the art would have been motivated to do so, since both Kettlitz et al and Daenzer-Alloncle et al. disclose use of modified starch as a viscosity component; foods that undergo UHT/high-temperature/sterilization/ pasteurization treatment; and the importance of heat stability of starches. Regarding particular viscosity recitations after re-heating in claims 1, 2, 5, 7 and 21, it is noted that although the references do not specifically disclose every possible quantification or characteristic of its product, such as viscosity after re-heating, this characteristic would have been expected to be in the claimed range absent any clear and convincing evidence and/or arguments to the contrary. The combination of references disclose the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of the ordinary skill in the art would recognize that the viscosity after re-heating, among many other characteristics of the product obtained by referenced method, would have been an inherent result of the process disclosed therein. The Patent Office does not possess the facilities to make and test the referenced method and product obtain by such method, and as reasonable

reading of the teachings of the references has been applied to establish the case of obviousness, the burden thus shifts to applicant to demonstrate otherwise.

In response to Applicants' arguments on pages 11-13, Applicants are referred to the response as stated above. Further in this regard, it is noted that:

- Products containing starch n-alkenyl succinate as texturizing agents were well known in the art (see Kettlitz '894);
- Among the products containing starch n-alkenyl succinate as texturizing agents were soups, sauces, meat products, dressings, micro-wavable foods, bakery creams and fillings, and convenience foods that need to have a high viscosity and smooth texture after heating (see Kettlitz '894). Therefore, Kettlitz et al disclose use of stabilized starch n-alkenyl succinate in the food products that normally undergo UHT/high-temperature/sterilization/ pasteurization treatment.
- Daenzer-Alloncle et al is relied upon as a teaching of use of modified starch as a viscosity controlling component in a cream product that undergoes ultra-high temperature ("UHT") treatment.
- Product as mentioned above (soups, sauces, meat products, dressings, micro-wavable foods, bakery creams and fillings) were well known to be reheated again before consumption. Therefore, the change in the viscosity after re-heating is the inherent result of the use of the starch n-alkenyl succinate as texturizing agents in these products absent any clear and convincing evidence and/or arguments to the contrary.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to VERA STULII whose telephone number is (571)272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, JENNIFER MCNEIL can be reached on (571)272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Steve Weinstein/
Primary Examiner, Art Unit 1794

VS